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## Canadian Indirect Tax News

December 2009 (09-11)

### The march toward the harmonized sales tax continues

The federal government and the governments of Ontario and British Columbia are busily preparing for sales tax harmonization which will come into effect on July 1, 2010. The federal and the Ontario enabling legislation have both been enacted; both statutes received Royal Assent on December 15, 2009.

British Columbia has not yet introduced enabling legislation.

Ontario's legislation winds down the retail sales tax, substantially giving effect to the retail sales tax transitional rules that were described in the October 22, 2009 edition of *Canadian Indirect Tax News*.

The federal legislation to bring in Ontario and British Columbia as "participating provinces" lays the groundwork for harmonization but does not set out detailed rules. Instead, the Minister of Finance is given broad authority to develop and implement the details of harmonization by way of regulation through order-in-council, rather than by the introduction of amendments to the Excise Tax Act. This broad authority covers the long-awaited place-of-supply rules as well as the specific self-assessment rules that impact investment funds and other financial institutions – but also permit adjustments even to the exempt and zero-rated supply schedules. There are also indications that the Department of Finance (Finance) may be contemplating changes by regulation to some of the existing extent-of-use criteria, such as in the self-assessment provisions.

Implementation by regulation will allow Finance to react more quickly and will introduce flexibility in resolving unanticipated issues. This process will also give Finance a freer hand in making changes to address what it might perceive as tax "slippage" or avoidance. Unlike the 1997 harmonization regulations, there is no "sunset" period on these regulations or on the Minister's power to propose regulations going forward.

### Finance tightens the GST definition of "financial services"

In Announcement 2009-115, released December 14, 2009, Finance finally acted to remove the "uncertainty" that it believed was created by recent court decisions, notably *Canadian Medical Protection Association*<sup>1</sup>, *Costco*<sup>2</sup>, *PC Bank*<sup>3</sup> and,

<sup>1</sup> *The Queen v The Canadian Medical Protective Association*, FCA 2009 (Docket: A-243-08); affirming TCC 2008 (Docket: 2005-98(GST)G).

apparently, *Les Promotions DND*<sup>4</sup>. The view of Finance and the Canada Revenue Agency (CRA) is that these cases opened the door to allow too broad a range of intermediary actions to constitute “arranging for” other financial services and, as such, to be considered GST-exempt financial services. Finance and the CRA now want to ensure that activities that they consider to be in the nature of management, administration, marketing or promotional activities are viewed only as inputs of financial services, and not themselves financial services. This is so notwithstanding that many of the CRA’s own rulings, and, arguably, its own policy statement on “arranging for” noted that these activities could in the proper circumstances constitute part of the financial service process.

This announcement will be a big disappointment to the numerous investors who filed applications for a refund of GST paid in error on their investment management fees. It will also affect, and render more costly, a number of arrangements under which commercial businesses or associations have become involved in the provision of credit to their customers or association members.

The definition of “financial service” will expressly exclude the following:

- **investment management services** (with or without discretionary authority), thereby statutorily overruling the decisions of the Tax Court and the Court of Appeal in the *Canadian Medical Protection Association* case. Paragraph (q) of the definition of “financial service” in the Excise Tax Act will also be amended to ensure that investment management services come within the exclusions contained in that paragraph.
- **facilitatory services**, such as market research, product design, document preparation or processing, customer assistance, advertising, promotional or similar activities and the collection, collation or provision of information (*Les Promotions DND*; *Costco*; *PC Bank*).
- **credit management services**, including credit checking, valuation, authorization service, making decisions relating to a grant or an application for a grant of credit, creating and maintaining records relating to a grant or an application for a grant of credit on behalf of the credit provider and monitoring payment records or dealing with payments (*Les Promotions DND*; *PC Bank*).

Draft legislation did not accompany the announcement.

The proposed amendments will apply both prospectively and retroactively unless a supplier of a service did not charge GST on its services rendered under an agreement for the supply of those services.

The announcement also, pointedly, noted that the CRA may reassess the net tax of a person for a reporting period to take into account any difference that would result after applying the proposed amendment. It remains to be seen whether the CRA, who we understand did pay out a certain number of rebate claims based on the arguments in the *Canadian Medical Protection Association* case, will reassess the payees to recover the rebate payments.

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<sup>2</sup> *Costco Wholesale Canada Ltd v The Queen*, TCC 2009 (Docket: 2007-1374(GST)G).

<sup>3</sup> *President's Choice Bank v The Queen*, TCC 2009 (Docket: 2007-2726(GST)G).

<sup>4</sup> *Les Promotions DND Inc v The Queen*, TCC 2006, (Docket: 2003-4048(GST)G).

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